United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-6054

United States Court of Appeals
FOR THE SECOND CIRCUIT

GIUSEPPE CATANZARO,

Plaintiff-Appellant,

against

CENTRAL GULF STEAMSHIP CORP.,

Defendant and Third Party Plaintiff-Appellee,

against

UNITED STATES OF AMERICA,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEE'S BRIEF

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Issues Presented

After a five day trial before Judge Levet and a jury, verdict for the defendant and judgment having been entered dismissing the plaintiff's complaint, all parties having been represented by experienced trial counsel, may the plaintiff base an appeal on *ad hominem* attacks on the trial judge and counsel for the defendant?

May an appellant, without having placed an appellee on notice, as required by the Federal Rules of Civil Appeals, so emasculate the record below as to put forward to this Court in its Appendix a distorted view of the trial below?

Preliminary Statement

FRAP Rule 30B specifically requires an appellant to serve a designation of those parts of the record he intends to include within the Appendix. No such designation was made by appellant and the Appendix herein fails to reflect a reasonably true picture of the record. Since the entire record is available to this Court, appellee shall refer throughout this brief to portions of the Trial Transcript, not reproduced in the Appendix.

There is no complaint by appellant that the Court below made any errors in its evidentiary rulings or in the charge as given.

Statement of Facts

At about 3 p.m., October 31, 1970, the GREEN FOREST, which had finished discharging that portion of her cargo of ammunition scheduled for Cam Rahn Bay, Vietnam, was ordered to leave the ammunition dock by the military command due to the fact that enemy rockets were landing in the port area, (TT 363, 366, 382, 391, 395, 406 and 496). Plaintiff, admitted that he received a $200 "attack bonus" for a hostile activity in Cam Rahn Bay on October 31, 1970, (TT 115). The military command dispatched an army undocking pilot and an army tug to expedite the undocking of the vessel. The plaintiff-appellant, an ordinary seaman sustained personal injuries when he was tripped by the surge in the spring line which he was bringing in with the assistance of fellow crew members, McCoy and Jackson under the direction of the vessel's Second Mate Mr. Friend. (TT 363, 366) Plaintiff alleges

that his injury was the result of the negligence of his employer and the unseaworthiness of the vessel. The uncontradicted testimony before the Court established that due to emergency conditions the army pilot ordered the army tug to push against the starboard bow of the vessel before the spring line had been completely brought aboard the GREEN FOREST. (TT 398, 402, 406, 499 and 503) He testified that normally he would wait until all lines were on deck before ordering the tug in but that in emergencies he would not wait due to the need of haste. The eye of the spring line momentarily caught on the cruciform bitt of the tug causing the line to tauten and surge (TT 499 and 501). In the circumstances, the jury found no negligence on the part of the vessel owner or unseaworthiness on the part of the ship.

POINT I

Appellant's allegation of derogatory remarks of the Court pertaining to plaintiff's expert and manifest prejudicial bias of the Court against the plaintiff and his counsel as well as prejudicial remarks of defense counsel are illfounded.

Appellants Point I, Point III and Point V allege prejudice of the trial court against Appellant, his counsel, his expert and prejudice of defense counsel. These three points are treated together.

In *United States* v. *Weiss*, 491 F 2d 460, 467-470, this Court evaluated the effect of allegedly prejudicial comments, hostility towards a party and castigation of that parties' counsel to a degree substantially in excess of Judge Levet's conduct in the instant case. This court held that a new trial was not justified. In so holding this Court noted that the appellant had quoted an impressive array of rebukes, threats and harsh statements of the trial judge

taken out of context. Noting that quotations lifted out of context can often be unintentionally misleading, since they fail to give the complete description and background of the allegedly prejudicial remarks, this Court stated that such out of context excerpts required it to read the entire trial transcript. This Court having read the entire trial transcript concluded that the repetitive attempts of counsel to introduce irrelevant evidence was the cause of the trial courts loss of patience. It is submitted that the quoted remarks of Judge Levet in appellant's Brief were lifted out of context to conceal the fact that they were provoked by the appellant's trial counsel and his expert witness. A complete reading of the trial transcript, by this Court, it is submitted, is suggested in this appeal.

Mr. Boulalas was called as an "expert" on behalf of the plaintiff. The testimony of this witness commences at TT 223 of the trial transcript. The testimony of Mr. Boulalas that he had graduated from nautical college, served as an apprentice, third-mate, second-mate and master on all types of ocean-going vessels, rising to the rank of Master in approximately one year is incredible. In this country to qualify as a Master, the applicant must have graduated from an approved maritime school and served at least one year as a chief-mate, one year as a second-mate and one year as a third-mate (46 CFR 10.05).

His expertise has never been conceded by the defendants and no ruling was made by the Court that he was a qualified expert. Within two pages (TT 225), the plaintiff, apparently on the assumption that Mr. Boulalas had been qualified, began laying the ground work for a hypothetical question by referring the witness to depositions and reports which were not in evidence. Seeking clarification on the court's part, it used the expression when referring to the witness as a "proposed expert". The next series of questions, at TT 234 reflect inaccuracies and improprieties on the part of the plaintiff's counsel in attempting to follow up the framing of this improper hypothetical question. An

expert cannot base his opinion upon facts not in the record, *Atlantic Mutual* v. *Lavens Shipping*, 551 F. 2d at 473.

At TT 234 defense counsel clearly stated that it made no concessions as to the witness' expertise. When asked of his experience on vessels during wartime the witness recalled a case in 1955 in Argentina. Since the Court was unfamiliar with any "war" in Argentina, the Court was prompted to ask what war was that. 2 Encyclopedia Brittanica (1962 Edition) P. 368, in two sentences states that on September 16, 1955, the armed forces started a "liberalizing" revolution in the provinces, that Peron's support crumbled so quickly on September 19, he resigned and took refuge on a Paraguayan gunboat. Similarly the witness referred to warlike operations in Cyprus and in Uruguay.

Having marked Exhibit 6 in evidence without showing the exhibit to the witness, plaintiff's attorney asked the witness if he had reviewed it. The witness responded to the effect that he did not know what Exhibit 6 was. This prompted the Court to suggest to the plaintiff's counsel that he show the witness the Exhibit. The foregoing brief references at the beginning of Mr. Boulalas' testimony set the stage and further incidents complained of by plaintiff fall in the same category. They were prompted by the plaintiff's counsel attempts to reask questions after objections had been sustained.

Under Point III plaintiff alleges that the defendant's trial counsel made prejudicial remarks throughout the trial and characterizes the defendants' opening statements as an improper summation. No objections are found in the record to the remarks made by defense counsel in either defense's opening or closing. Plaintiff fails to realize that defendants' trial counsel is an advocate for his client and the Trial Transcript shows that in fact defense counsel tried to assist appellant's counsel on several occasions. (TT 229, 237, 239)

It is important to note that in its charge to the jury, the Court clearly stated:

> "During the course of this trial and during summations, anything that has been said by counsel or by the Court during these summations or during the course of the trial is not to be taken by you in place of your own recollection of the facts or the evidence. No comments by counsel or by the Court are evidence. You are to draw no inference from any such comments." (TT 583)

The Court continued:

> "Nothing that the Court said is to be construed to indicate what your determination should be except, of course, that I expect you to follow these instructions which I am now giving to you." (TT 584)

POINT II

The Trial Court was not guilty of prejudice or abuse of discretion in refusing in mid trial to permit plaintiff to engage new counsel as alleged by the appellee.

In *National Equipment Rental, Ltd.* v. *Mercury Typesetting Co.*, 323 F. 2d 784, 786, this Court said:

> "The law seems well settled that a federal district court may condition the substitution of attorneys in litigation pending before it upon the client's either paying the attorney or posting security for the attorney's reasonable fees and disbursements, as these may be determined, (See, e.g., The Flush, 277 F. 25 (2 Cir. 1921); First Iowa Hydro Electric Cooperative v. Iowa-Illinois Gas and Electric Co., 245 F. 2d 613 (8 Cir. 1957). This power resides in the federal court as ancillary to its conduct of the litigation."

In *Nazzaro* v. *Winer*, 38 F.R.D. 430, aff'd 353 F. 2d 537 (3rd Cir.), it was clearly held that a district court had the authority, on plaintiff's motion for a voluntary dismissal without prejudice, to require plaintiff to reimburse defendant for its attorneys fees, costs of stenographic transcripts and payment of other disbursements incurred in preparation of the defense of the action. F.R.C.P. Rule 41(a) specifically provides that after a defendant has interposed an answer, an action cannot be dismissed on plaintiff's motion except by order of the court and upon such terms and conditions as the court deems proper.

Applying these principles to an action where pre-trial preparations had been completed, a jury impanelled and the first day's testimony had been taken in the trial, for a district court to have allowed plaintiff to substitute his attorney, thereby necessitating a mistrial, without imposing conditions, would have been completely inequitable to the defendant.

The Trial Transcript, TT 56 *et seq.*, reflects an in chambers conferences attended by the Court, counsel and plaintiff. On the second day of the trial, plaintiff, who had kept the Court, the jury and counsel waiting for some 45 minutes beyond the scheduled resumption of the trial, advised the Court that he would like to replace his counsel. No substitute counsel had been employed by plaintiff and the orderly conduct of the trial would have been impossible if the Court had granted plaintiff's request. The attorney for the defense advised the Court that he had arranged for an out of town witness to appear, that that witness was enroute and in the circumstances he could not consent to a mistrial. Counsel for the third party defendant, United States, similarly indicated that he had arranged for an out of own witness to be enroute to New York at the time plaintiff made his request. In the circumstances, the Court advised the plaintiff that it could not grant a mistrial to permit plaintiff to seek new counsel unless the plaintiff

agreed to compensate opposing counsel for their time and disbursements. The suggestions made by the Court to plaintiff were clearly not an abuse of discretion or evidence of prejudice. This was not a situation where days or weeks before a trial is scheduled to begin a Court arbitrarily refused to permit substitution of attorneys by either of the parties. To have granted plaintiff's application unconditionally would have penalized both the Court and the attorneys for all parties. In fact plaintiff withdrew his request to substitute counsel and consented although off the record, and did continue the trial with the same counsel (TT 77-80). See *United States* v. *Weiss, supra* at 469.

POINT III

The trial court did not commit error in denying plaintiff's request to charge.

Where a party attacks, in this court, a trial court's charge to a jury, whether that attack is based upon what was charged or what was omitted from the charge, it is the function of the appellate court to view the charge as given in the light of the evidence presented to determine whether the charge was confusing or misleading. *Oliveras* v. *U.S. Lines,* 318 F. 2d 890, 892. In this appeal, appellant contends that the trial judge improperly refused to grant its request to charge. There is no obligation on a district court to charge a jury in the language suggested by either party.

While the Appendix to this appeal sets forth plaintiff's requests, it fails to contain the judge's ruling on the requests or the charge of the court as given. It is to be noted that the only objection made by appellant was a general exception without setting forth the specifics as required by F.R.C.P. Rule 51 (TT 518-519). This court's attention is brought to the fact that the judge's charge is reported at TT 582-619 and is complete and embodies all items to which

plaintiff was entitled in the light of the complete trial record.

The actual ruling of the trial court on plaintiff's request for charge is found at TT 517-518 and is quoted below.

> "Paragraph 1 of the plaintiff's request is granted;
> 2, except as charged;
> 4 is likewise refused except as charged;
> 5 is granted as charged;
> 6 is granted as charged;
> 7 is granted as charged;
> 8 is refused except as charged;
> 9 is refused;
> 10 is granted as charged;
> 11 is granted as charged;
> 12 is refused except as charged, and 13 is not applicable and is therefore refused."

The only two of plaintiff's requests which were denied in full were Request No. 9 and Request No. 13.

Request No. 9 of the plaintiff was for a charge of the *res ipsa loquitur* doctrine, that was properly denied. The uncontradicted testimony appearing in the trial transcript establishes that the harbor master had declared an emergency and had ordered an army undocking pilot and an army tug to expedite the undocking of the two vessels at the ammunition pier. The testimony of the tug captain and pilot is clear that because of the emergency condition the pilot ordered the tug to push against the starboard bow of the vessel before the springline had been completely brought aboard the vessel. It was the momentary catching of this line on the cruciform bitt of the tug which caused the line to tauten and surge. It is thus seen that the defendant was not in exclusive control of the instrumentality which brought about the accident from which plaintiff's injuries occurred.

Plaintiff's request #13 to the effect that certain presumptions against the defendant should come into force because of alleged erasures in the vessel's log is unfounded. The only reference to any alleged erasure is based upon the fact that at TT 489-490, plaintiff's counsel suggested that portions of the log had been erased because the Second Officer could not read a log entry made in someone else's handwriting. The record fails to indicate that the illegible portion of the log, if any, had been shown to the court the jury or to defense counsel. There is no indication by the court or defense counsel that plaintiff's reference to erasures was in any way correct.

CONCLUSION

Based upon the Transcript of the trial minutes and the contents of this brief, the appellant not having contested any trial ruling of the Court and not having excepted to the charge as given, it is respectfully urged that this appeal be dismissed and the judgment of the Court below affirmed, with costs to the defendants.

Respectfully submitted,

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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

New York Supreme Court Appellate Division Department

US COURT OF APPEALS FOR THE SECOND CIRCUIT

CATANZARO

VS

CENTRAL GULF STREAM

State of New York, County of New York, ss.:

HAROLD DUDASH, being duly sworn deposes and says that he is agent for Healy Stonebridge & Mc Caffrey the attorney for the above named def and third-party pl-appellee herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland Avenue, Bronx, N. Y.

That on the 24th day of August, 1976, 1976, he served the within appellee's brief

upon the attorneys for the parties and at the addresses as specified below

[redacted]

Shapiro & Somer, 1557 Straight Path, Wyandanch, NY 11798

by depositing two copies

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 24th day of August, 1976, 1976

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Services of three (3) copies of

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